

example, if the request to partition was filed a year or more in advance of the benchmark date). Since any partitioned area is likely to be one that the MTA/EA licensee is not interested in serving, the partitionee will probably be "starting from scratch" in building out that area. Requests for extension of the benchmark deadlines by partitionees should receive favorable treatment if the partitionee can show that there was insufficient time from the grant date of the partitioned license to meet a benchmark, due to regulatory delays not occasioned by the parties to the partitioning agreement.

MTA/EA licensees, on the other hand, should be held to the one-third and two-thirds coverage benchmarks based on the entire MTA/EA, to avoid the use of partitioning as a method to circumvent the coverage benchmarks. An exception to this rule could be made where the MTA/EA licensee is a bidding consortium or joint venture that agreed prior to the auction to divide the MTA/EA into specified partitioned areas, and so disclosed on its "short form" application.

Where a license is being paid in installments, the rules should allow the partitionee to assume a portion of the amount owed; the relative value of the partitioned service area should be based upon its population relative to the remainder of the MTA/EA. If the partitioner obtained a bidding credit and installment payments, and the partitionee is not qualified to obtain similar treatment, the amount of the "unjust enrichment" payments should likewise be calculated based upon the relative value of the partitioned area, using population coverage as the objective measure of that value.

There is some fairness in requiring the partitioner to guarantee all payments on the full amount of its winning bid; however, default by the partitioner should not affect the partitioned

service area as long as the partitionee makes timely payment of its proportionate obligations. Conversely, in the case of default by a partitionee, if the Commission seeks to hold the initial MTA/EA licensee liable for the monies owed by the partitionee, it should provide that licensee with notice of the partitionee's default before that default reaches the point warranting license revocation.

C. License Term for Partitioned Licenses.

Metrocall concurs with the FCC's tentative conclusions that partitionees should be licensed for the remainder of the partitioner's license term, and they should be entitled to renewal expectancies in the same manner as any other paging licensee. See FNPRM at ¶ 211.

D. Disaggregation.

Metrocall is not convinced that disaggregating spectrum from a single paging frequency is a viable option at this time. Other services, for which the Commission has adopted disaggregation Rules, were allocated significantly more spectrum per channel than paging.

Consequently, Metrocall does not believe that general disaggregation Rules for paging are necessary at this time; nonetheless, the Rules should not completely forbid disaggregation. Rather, the Commission should retain discretion to review disaggregation proposals on a case-by-case basis. If a licensee seeking to disaggregate a portion of its paging frequency can demonstrate that it is technically feasible to do so; that both the disaggregator and disaggregatee will be able to provide legitimate signaling services on their respective portions of the frequency; and that the public interest would be otherwise served by the proposal, there appears to be no reason why the FCC should not favorably consider such a proposal.

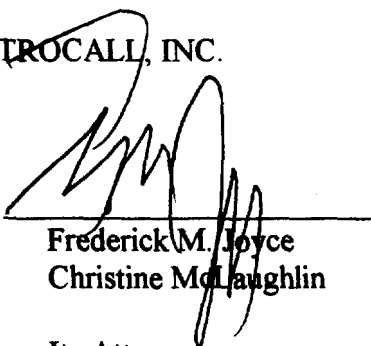
CONCLUSION

For all the foregoing reasons, Metrocall respectfully requests that the FCC should not impose additional coverage requirements on nationwide paging licensees, but should adopt rules concerning the other issues raised in the FNPRM in accordance with these Comments.

Respectfully submitted,

METROCALL, INC.

By:



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April 17, 1997

EXHIBIT ONE

Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 81-112 :
29085

In re Applications of

A, F & L TELEPHONE

For renewal of license of
Station KCC480, operating
on frequencies 454.025 and
152.210 MHz in the Domestic
Public Land Mobile Radio
Service at Leominster,
Massachusetts

RIVERS ASSOCIATES, INC.

For Construction Permit for
a new station to operate on
frequency 454.025 MHz in the
Domestic Public Land Mobile
Radio Service at Fitchburg,
Massachusetts

File No. 23145-CD-R-79

File No. 21501-CD-P-79

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 1981 Released: March 12, 1981

By the Commission: Chairman Ferris not participating.

1. The Commission has before it for consideration the above-captioned applications and various petitions and pleadings related to them. For the reasons stated herein, we have decided to designate both applications for hearing.

BACKGROUND

2. A, F & L Telephone (A, F & L), the licensee of Station KCC480 in the Domestic Public Land Mobile Radio Service (DPLMRS) timely filed its renewal application, which appeared on the Common Carrier Public Notice of March 5, 1979, Report No. 952, as being accepted for filing. The renewal was granted on April 24, 1979. Notice of the grant appeared on the Common Carrier Public Notice of April 30, 1979, Report No. 960-A.

3. On May 2, 1979, Rivers Associates, Inc. (Rivers) filed an "informal objection" to the A, F & L renewal application. On May 4, the 60th day after public notice announcing the A, F & L application for renewal of its license had been accepted for filing, Rivers filed its application for frequency 454.025 MHz and requested that it be considered as being electrically mutually exclusive with the A, F & L

renewal application. In a Public Notice of May 7, 1979, Report No. 961-A, the Bureau announced its rescission of A, F & L's renewal grant without setting forth its reasons. On the May 14, 1979, Public Notice, Report No. 962, the Rivers application was listed as having been accepted for filing. The Chief, Mobile Services Division (MSD), by letter of May 17, 1979, vacated the rescission of the grant of the A, F & L renewal. Public Notice of the vacated rescission appeared on May 21, 1979 in Public Notice Report No. 963-A. On June 13, 1979 A, F & L filed a petition to dismiss or deny the Rivers application.

DISCUSSION

4. The parties seek reconsideration of virtually every step taken thus far. For clarity, we will begin with the decision to rescind the grant and the subsequent letter vacating that rescission. We will then look at the propriety of a renewal grant under these circumstances. Finally, we will consider the procedural issues related to the Rivers application.

5. We find that the staff's action rescinding its earlier grant of the A, F & L renewal application was consistent with our rules and entirely appropriate because it appeared that the grant might not promote the public interest. See, 47 U.S.C. § 309. We note that the staff has authority to set aside any action it takes within 30 days of the public notice announcing the action pursuant to Section 1.113 of the Commission's Rules. ^{1/} The staff's action here was consistent with this rule even though the Public Notice did not set forth a reason for the rescission and the licensee did not receive an explanation until later when the MSD vacated its action setting aside the grant. ^{2/}

6. The Commission has broad discretion to set aside its own actions pursuant to Section 1.113 of the Rules. The power of the Commission to reconsider its actions has been held to be inherent in its power to decide. See Albertson v. FCC, 182 F. 2d 397, 399 (D.C. Cir. 1950). The setting aside of a grant under Section 1.113 of the Rules is different from the revocation of a license under Section 312

^{1/} 47 C.F.R. Section 1.113(a) provides:

Within 30 days after public notice has been given of any action taken pursuant to delegated authority, the person, panel, or board taking the action may modify or set it aside on its own motion.

^{2/} The present Section 1.113 replaced the former Section 1.87, which specifically provided that when the Commission modified an order it was required to give reasons for its action and direct the licensee to show cause why the modification was improper. 28 F.R. 12386. The fact that the present version of Section 1.113 does not require such formalities indicates the Commission's intention to retain its discretion to modify or set aside a grant order without a need to state its reasons when such action occurs within thirty days of the grant.

of the Communications Act of 1934, as amended. ^{3/} During the 30-day period after a grant is made, the Commission may, on its own motion, restore the grantee of a license to "applicant" status. ^{4/} While the Commission may not act arbitrarily or capriciously in rescinding a grant, it is clear that the staff's action in this proceeding was reasonable. Rivers alleged that A, F & L's license renewal should be denied for non-use of a frequency. This allegation, supported with specific, documented information, was a serious charge related directly to our primary function of promoting efficient use of radio communications facilities. See 47 U.S.C. § 151. Regardless of the form or source of the information, the staff correctly took action to preserve the Commission's ability to alter the earlier decision to grant if the facts so warranted. ^{5/}

7. The fact that A, F & L's renewal grant was rescinded without a statement of reasons was not unfair. The renewal application was merely returned to a "pending" status. The fact that the rescission made it possible for Rivers to file a mutually exclusive application, see discussion below, does not alter this conclusion. See WPIX, Inc., 18 FCC 2d 1057 (1969). See also footnote 9, infra.

8. As the discussion above makes clear, we believe that rescission was appropriate in this case. The staff's May 17, 1979 letter vacating the rescission either because the form of the information was not technically correct, or because A, F & L had not yet responded, or because there was some question concerning the admissibility of the Rivers' evidence, was in error. The staff action vacating the rescission was premature. It was necessary to fully evaluate the charges, decide whether an independent investigation was warranted and, if so, await the outcome of that investigation before acting further on the license renewal application. Accordingly, our decision here will reinstate the rescission and, for the reasons discussed below, we will designate the mutually exclusive applications for an evidentiary hearing.

^{3/} 47 U.S.C. § 312.

^{4/} After 30 days, the Commission would have to proceed through revocation and would have the burden of proof if it decided that a construction permit should be revoked. See Daryal A. Myse, Esq., 57 FCC 2d 803 (1975), and Texas Two-Way Communications, 26 FCC 28 (1959).

^{5/} See Hubbard Broadcasting, Inc. 41 RR 979 (1977). This is not to say that any spurious claim made after grant of an application would require rescission. The staff must evaluate any information presented and decide on a case by case basis. Today, we find only that the staff did not err in this case.

9. Next, we consider Rivers' objections to renewal of the A, F & L license. Rivers charged A, F & L with nonuse of frequency 454.025 MHz and with lack of candor in reporting usage on that frequency. Specifically, Rivers alleged that monitoring of frequency 454.025 MHz between October 1978 and April 1979 showed a lack of regular usage of that channel. In fact, for a period of four months prior to the filing of the A, F & L application (October 1978 through February 1979) no transmissions, other than periodic and sporadic station identification and time announcements totalling 27 minutes of air time, were made on that frequency. In addition, Rivers charged that frequency 454.025 MHz was completely out of operation for at least the period of October 29, 1978 through November 30, 1978 in contravention of Section 22.303 of our Rules which governs discontinuance, reduction or impairment of service.

10. In response, A, F & L did not dispute the accuracy of the Rivers charges. Instead, A, F & L argued that the charges included in the Rivers informal objection were based on information obtained in violation of two federal statutes: 18 U.S.C. § 2511 and 47 U.S.C. § 605. Thus, A, F & L argued, the communications monitored and any "fruits" thereof, must be excluded from evidence in the present licensing proceeding. We will address these arguments below

11. Section 605 of the Communications Act, as amended, 47 U.S.C. § 605, prohibits interception of a "radio communication," which is defined in Section 3(b) (insofar as is relevant here) as the "transmission by radio of . . . signals . . . and sounds of all kinds." 47 U.S.C. § 153(b). If there is no transmission of a signal or sound, then the mere listening in vain for such a signal or sound does not violate Section 605. The last sentence of Section 605 states that communications "for use of the general public" are excluded from the section's privacy protection. See, In the Matter of James Reston, Jr., 72 FCC 2d 662, 666-668 (1979). All that Rivers intercepted was 27 minutes of time announcements and station identification transmissions. These interceptions by Rivers were not personal or private point-to-point transmissions between individual parties which are protected by Section 605, but instead they were transmissions commonly understood to be intended to be received and used by the general public. Accordingly, there was no Section 605 violation of Rivers. 6/

6/ Because of the foregoing conclusion, it is not necessary to reach other issues under Section 605, including whether Rivers divulged any communications for "his own benefit" and whether its divulgence to FCC law enforcement officials qualifies Rivers for the "law enforcement exemption" in United States v. Hall, 488 F.2d 193 (9th Cir. 1973).

12. A, F & L also alleges that Rivers' monitoring was a violation of the Federal wiretap laws, specifically, Section 2511, 18 U.S.C. § 2511, and that under Section 2515, 18 U.S.C. § 2515, any information gained through that monitoring may not be used in an administrative proceeding. We need not decide whether the Rivers' monitoring violated Section 2511 since we do not base our conclusion regarding A, F & L's need for frequency 454.025 on that information. Rather, we arranged for the Commission's Field Operations Bureau to conduct two field inspections of Station KCC480 in order to obtain additional facts. The first inspection, conducted on April 3, 1980, indicated that station records showed that only six calls were made on frequency 454.025 MHz from January 23, 1980 to April 3, 1980. A second field inspection, conducted on August 5, 1980, revealed that Station KCC480 had no subscribers on frequency 454.025 between June 13, 1975 and July 27, 1976, and between October 15, 1976 and April 1, 1979. The inspection report indicated further that, as of the date of the second inspection, there were only two subscribers to that frequency and both of them indicated very low usage. These investigations provide independent evidence of non-use and are the sole basis for our conclusion today that there is a material and substantial question regarding usage of frequency 454.025 MHz.

13. Apparently, A, F & L would have us conclude that if Rivers' monitoring was in violation of the wiretap law, then not only is Rivers' information inadmissible but so is the evidence gleaned from our independent investigation inadmissible pursuant to Section 2515. 7/ We disagree. First, the field investigations were conducted lawfully and may be disassociated from the former monitoring. In other words, even if the Rivers' evidence were inadmissible, its inadmissibility would not affect the lawfulness of the Commission's own investigation or taint the evidence obtained from that investigation. Cf. *United States v. Hall*, 488 F. 2d 193 (9th Cir. 1973). Second, even if Rivers' monitoring were contrary to Section 2511, Section 2515 does not preclude use of Rivers' information or our separate investigations because § 2515 only applies where "wire or oral communications" have been intercepted. "Oral Communications" within the meaning of the statute are limited to utterances "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The 27 minutes of station

7/ Section 2515 reads:

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

identification and time announcements which Rivers intercepted were radio-to-radio communications and did not involve landline telephone reception. The Ninth Circuit has held that, as a matter of law, such radio-to-radio communications are not communications as to which the parties have a reasonable expectation of privacy in the sense required by § 2510(2) and the Fourth Amendment. United States v. Hall, 488 F. 2d 193, 196-97 (9th Cir. 1973). Consequently, no "oral communications" were intercepted. Similarly, because no landline communications were involved with the Rivers monitoring, no "wire communications" were intercepted. Thus, there is no basis to hold that the Rivers' information, or our field investigation evidence, is inadmissible in this proceeding.

14. In addition to the above, Rivers argues that A, F & L should not obtain a grant of renewal because of its lack of candor in disclosing the level of usage of its facilities. As we understand it, Rivers' charge is based on the fact that the A, F & L renewal application states that as of December 31, 1978, 52 two-way units and 80 one-way units were being served by Station KCC480, of which only three two-way and one one-way units were not for public service. In contrast to this statement by A, F & L, the Rivers monitoring showed that no units were being operated on frequency 454.025 MHz at that time. However, the A, F & L renewal application does not state which of the KCC480 frequencies these units were operating on. Section 22.511(a) of our Rules, which requires information on the number of units being served by renewal applicants, is not clear on whether an applicant must provide a separate showing for the number of units being served on each channel. In addition, applicants seeking renewal of multiple frequency licenses often provide this information in the same format as A, F & L and our practice has not been to pursue a candor issue against such applicants. Our review indicates that the apparent inconsistency can be explained by the fact that the usage reported with the A, F & L renewal application includes both of the authorized frequencies while the Rivers monitoring involved only frequency 454.025 MHz. Accordingly, we will not designate a candor issue against A, F & L.

15. After considering all of the arguments, we find that the A, F & L application leaves a material and substantial question of fact as to whether A, F & L has justified a need for frequency 454.025.

16. A, F & L argues that the Rivers application was cut-off from consideration because it was filed after the original grant of the A, F & L renewal of license. In response, Rivers argues that the grant of the A, F & L renewal of license was made void by our rescission and that its application was timely filed on the 60th day following the public notice of the acceptance for filing of the

A, F & L application. ^{8/} We believe the timeliness of the Rivers filing is dependent on the validity of our rescission of the initial grant of the A, F & L renewal license. To rescind is to void; thus our reinstatement of the earlier rescission renders the original grant without effect. As a result of this rescission, the full 60 day filing period, permitted by § 22.31(b), became operative. The Rivers application is thereby entitled to comparative consideration with the A, F & L application because it was filed by the sixtieth day after the A, F & L was put on Public Notice as being acceptable for filing. As noted above, we have determined that our rescission was proper and the letter vacating that rescission was incorrect.

^{8/} Our "cut-off" rule for determining the timeliness of subsequently filed mutually exclusive applications, 47 C.F.R. Section 22.31(b), provides:

An application will be entitled to comparative consideration with one or more conflicting applications only if:

- (1) The application is mutually exclusive with the other application; and
- (2) The application is received by the Commission in a condition acceptable for filing by whichever "cut off" date is earlier:
 - (i) Sixty (60) days after the date of the public notice listing the first of the conflicting applications as accepted for filing; or
 - (ii) One (1) business day preceding the day on which the Commission takes final action on the previously filed application (should the Commission act upon such application in the interval between thirty (30) and sixty (60) days after the date of its public notice).

3

Accordingly, we find that Rivers application was timely filed and is electrically mutually exclusive with the A, F & L renewal application. 9/

17. A, F & L also charges that Rivers lacks the character to be a Commission licensee because of its monitoring of A, F & L's transmissions and that the need showing included in Rivers' application is inadequate. 10/ First, as discussed above, we have concluded that Rivers' monitoring did not violate § 605 of the Communications Act, the statute by which we primarily measure our licensee's conduct to determine their fitness to remain licensees. Second, we do not believe that Rivers' monitoring should give rise to the addition of a character issue because of a possible violation of 18 U.S.C. § 2511. It appears that the main intent of § 2511 is to protect against invasions of privacy and as we discussed above, no protected communications as defined by § 2510 were intercepted by Rivers.

18. In view of the foregoing, we find Rivers to be legally, technically, and otherwise qualified to construct and operate the proposed facilities. We further find A, F & L to be legally, technically and otherwise qualified to remain a Commission licensee, except as noted above. We further find our grant of the A, F & L application for facilities to operate on frequency 152.210 MHz to be in the public interest. Accordingly, IT IS ORDERED, That the A, F & L petition for reconsideration with respect to our rescission of the renewal grant to A, F & L Telephone, File No. 23154-CD-R-79, IS DENIED, that the A, F & L petition for reconsideration with respect to our acceptance for filing of the Rivers application, File No. 21501-CD-P-79, IS DENIED, and that the Rivers petition for reconsideration of the grant and reinstatement of the grant of the A, F & L renewal application, File No. 23154-CD-R-79, IS GRANTED IN PART AND DENIED IN PART, to the extent that the grant of the A, F & L request for renewal of authority to operate on frequency 152.21 MHz IS AFFIRMED, and that the grant of the A, F & L application authorizing service on frequency 454.025 MHz IS SET ASIDE. IT IS FURTHER ORDERED, That the portion of the A, F & L Telephone application, File No. 23154-CD-R-79, involving frequency 454.025 MHz, and the application of Rivers Associates, Inc., File No. 21501-CD-P-79, ARE DESIGNATED FOR HEARING IN A CONSOLIDATED

9/ We emphasize that there may be occasions where a rescission is properly made but upon further consideration the Commission determines that the original grant was correct and that the rescission of that grant should be vacated. In such situations, a mutually exclusive application filed after the original grant would be cut-off from comparative consideration.

10/ A, F & L also charges that the Rivers financial showing is inadequate and that Section 310(d) of the act prohibits further consideration of the Rivers application because of the pending status of an A, F & L application for consent to assignment of license of Station KCC480. However, we need not consider the A, F & L financial charges because applicants in the DPLMRS are no longer required to demonstrate their financial qualifications, Elimination of Financial Qualifications, 82 FCC 2d 152 (1980). In addition, we need not consider the A, F & L charges regarding Section 310(d) because the A, F & L application for consent to assignment of license has been dismissed.

PROCEEDING, pursuant to Section 309 of the Communications Act of 1934, as amended, upon the following issues:

- (a) to determine the facts and circumstances surrounding the lack of usage of frequency 454.025 MHz by Station KCC480, including any discontinuance of service;
- (b) to determine on a comparative basis, the nature and extent of service proposed by each applicant 11/ including the dates, charges, maintenance, personnel, practices, classifications, regulations, and facilities pertaining thereto;
- (c) to determine on a comparative basis, the areas and populations that each applicant will serve within the prospective 39 dBu contours, based upon the standards set forth in Section 22.504(a) of the Commission's Rules, 12/ and to determine the need for the proposed services in said areas; and
- (d) to determine, in light of the evidence adduced pursuant to the foregoing issues, what disposition of the referenced applications would best serve the public interest, convenience and necessity.

19. IT IS FURTHER ORDERED, That, with respect to issue (a), the burden of proof and the burden of proceeding with the introduction of evidence is placed on A, F & L.

20. IT IS FURTHER ORDERED, That with respect to issues (b) and (c) the burden of proof and the burden of introduction of evidence is placed on each of the applicants as the issues affect them, and that the ultimate burden of proof with respect to issue (d) is similarly placed on each of the applicants.

11/ Section 22.504(a) of the Commission's Rules and Regulations describes a field strength contour of 39 decibels above one micro-volt per meter as the limits of the reliable service area for base stations engaged in two-way communications service on frequencies in the 450 MHz band. Propagation data set forth in Section 22.504(b) are the proper bases for establishing the location of service contours F(50,50) for the facilities involved in this proceeding.

12/ The comparative analyses may include past performance of the applicants.

21. IT IS FURTHER ORDERED, That the hearing shall be held at a time and place and before an Administrative Law Judge to be specified in a subsequent Order.

22. IT IS FURTHER ORDERED, That the Chief, Common Carrier Bureau, is made a party to the proceeding.

23. IT IS FURTHER ORDERED, That the applicants may avail themselves of an opportunity to be heard by filing with the Commission pursuant to Section 1.221(c) of the Rules within 20 days of the release date hereof, a written notice stating an intention to appear on the date for the hearing and present evidence on the issues specified in this Memorandum Opinion and Order.

24. The secretary shall cause a copy of this Order to be published in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

CERTIFICATE OF SERVICE

I, Regina Wingfield, a legal secretary in the law firm of Joyce & Jacobs, Attys. at Law, LLP, do hereby certify that on this 17th day of April, 1997, copies of the foregoing Comments of Metrocall, Inc. were mailed, postage prepaid, to the following:

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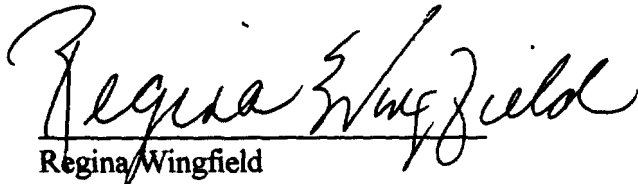
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